

1
2
3
4
5
6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9
10 AUGUSTINE A. WALKER,
11 Plaintiff,
12 v.
13 SEATTLE HOUSING AUTHORITY,
14 Defendant.

CASE NO. C04-1021JLR
ORDER

16 **I. INTRODUCTION**

17 This matter comes before the court on Defendant Seattle Housing Authority's
18 ("SHA") motions for summary judgment on Plaintiff Augustine Walker's ("Walker")
19 disability discrimination, race discrimination, age discrimination, retaliation, and hostile
20 work environment claims (Dkt. ## 26, 30, 34). Having read the papers filed in support of
21 and opposition to these motions, and heard oral argument, the court GRANTS SHA's
22 motions for summary judgment on Walker's disability discrimination, retaliation, and
23 hostile work environment claims, and DENIES SHA's motions for summary judgment on
24 Walker's race and age discrimination claims.
25
26

27 ORDER - 1
28

II. BACKGROUND

Walker filed suit against her former employer, SHA, alleging multiple claims of employment discrimination under state and federal law.¹ SHA denies Walker's claims and seeks summary judgment on her federal law claims for failure to accommodate, race and age discrimination, retaliation, and hostile work environment.

Walker is a 72-year-old African-American woman who suffers from osteoporosis, arthritis, carpal tunnel, and glaucoma. Her career at SHA began in 1987 and continued without incident until 2002, when Walker began having trouble with her direct supervisor, Noah Atkins (“Atkins”). Prior to being terminated in August 2003, Walker worked as a Customer Service Specialist II at SHA’s Porchlight Division. According to Walker and some of her fellow co-workers, Atkins treated Walker differently than younger, non-African-American employees. Jung Decl., at ¶ 5; Polwort Decl., at ¶ 4; Barraza Decl., at ¶ 5; Walker Dep. Test., at 128-31 (attached to Pl. Opp., Exh. 4). For example, Atkins allegedly “shadowed” Walker more than the other employees he supervised by following her around and hovering at her desk.² Polwort Decl., at ¶ 3. Atkins also allegedly belittled Walker in front of other employees, by publicly criticizing her job performance and holding her to a “100% compliance standard” unlike other employees. Id.; Barraza Decl., at ¶ 5; Jung Decl., at ¶¶ 14-15. In addition, Atkins

¹The court previously dismissed Walker's state law claims for failure to comply with Washington's notice requirements for filing suit against a local government entity. Order at 6-7, Dkt. # 24 (Feb. 9, 2005). Walker's state law claims consisted of a claim for race discrimination under the Washington Law Against Discrimination, and common law claims for negligent infliction of emotional distress and negligent supervision. Compl., at ¶ 1.

²Additionally, one of Walker's co-workers alleges that Atkins never "shadowed" any other employees under his supervision. Jung Decl., at ¶ 9.

1 allegedly refused to give Walker a disabled parking space at Porchlight, despite giving
2 such spaces to two Caucasian women. Walker Dep. Test., at 128-29.

3 Atkins also allegedly assigned Walker more work than could reasonably be
4 accomplished in an eight-hour shift, including daily filing, sorting and distributing daily
5 mail and faxes³, and assembling orientation and “lease-up” packets. Jung Decl., at ¶ 9.
6 The number of orientation and “lease-up” packets requiring assembly by Walker
7 allegedly tripled between late 2001 and April 2003 due to an increase in the number of
8 housing vouchers available to SHA. Id., at ¶12. Despite the increased need for packets,
9 SHA allegedly failed to allow Walker enough time to assemble the packets and assigned
10 her more duties. Id.; Barraza Decl., at ¶ 5. One of Walker’s former co-workers who held
11 her same position alleges that SHA assigned Walker a heavier workload than him, with
12 more production-related duties. Id., at ¶ 7.
13

Beyond Walker's discriminatory allegations regarding Atkins, one of Walker's co-workers alleges that Kathy Roseth ("Roseth"), the director of SHA's Porchlight Division, told her co-workers in February 2001 that she was "afraid of black women" based on a prior altercation in a park. Barraza Decl., at ¶ 7. At some point before August 2001, Roseth allegedly told her same co-workers that they should "watch out" for three particular SHA employees, all African-American women, because they were "out to get us." Id., at ¶ 10. Further, both Roseth and Charles Hayashi, SHA's Human Resources Director, allegedly made comments to one of Walker's former supervisors suggesting that Walker should retire. Id., at ¶¶ 7-8. One of Walker's co-workers alleges that she heard Atkins tell Walker she should "take early retirement." Polwort Decl., at ¶ 4.

³Currently, SHA has two people who sort the mail in Walker's former department. Jung Decl., at ¶ 10.

1 SHA denies discriminating against Walker and argues instead that it terminated her
2 for cause. Prior to terminating Walker, SHA issued a series of “counseling memoranda”⁴
3 regarding Walker’s alleged failure to perform her duties properly. Hayashi Decl., Exh. A.
4 Walker allegedly failed to deliver the mail and faxes in a timely manner, opened
5 confidential mail, failed to put away files, failed to take required ten-minute breaks
6 during the day, and failed to keep enough packets assembled. Id. Walker’s alleged
7 failure to maintain an appropriate number of assembled packets resulted in SHA
8 suspending her from work without pay on March 11, 2003 and June 24-26, 2003. Id.
9 Following both suspensions, Walker filed grievances and contended that SHA failed to
10 provide her with sufficient time to assemble the necessary packets. Id. SHA upheld both
11 suspensions, finding that it had provided Walker with “ample time” to complete the
12 packets and that Walker failed to request assistance when needed, despite SHA’s multiple
13 counseling memoranda recommending such a solution.
14

15 Walker contends that SHA’s discipline increased after she filed a complaint with
16 the Equal Employment Opportunity Commission (“EEOC”), although it is unclear from
17 the record when this occurred. Ultimately, SHA terminated Walker on August 28, 2003
18 for “failure to follow directions and meet deadlines, and unsatisfactory work performance
19 during the past year.” Atkins Decl., Exh. E. After SHA terminated Walker, it replaced
20 her with a Caucasian woman under the age of 40. Walker Dep. Test., at 128.
21
22
23
24
25
26
27

28 ⁴The counseling memoranda discussed Walker’s alleged performance failures and
proposed solutions to prevent future problems.

III. DISCUSSION

A. Legal Standard

Summary judgment is appropriate when the moving party demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The party moving for summary judgment “bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

Once the moving party meets its initial responsibility, the burden shifts to the non-moving party to establish that a genuine issue as to any material fact exists. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Evidence submitted by a party opposing summary judgment is presumed valid, and all reasonable inferences that may be drawn from that evidence must be drawn in favor of the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). The non-moving party cannot simply rest on its allegation without any significant probative evidence tending to support the complaint. See U.A. Local 343 v. Nor-Cal Plumbing, Inc., 48 F.3d 1465, 1471 (9th Cir. 1995). “[A] complete failure of proof concerning an essential element of the non-moving party’s case necessarily renders all other facts immaterial.” Celotex, 477 U.S. at 322-23.

B. Failure to Accommodate

To establish a prima facie claim for failure to accommodate under the Americans with Disabilities Act (“ADA”), Walker must show that: (1) she is disabled within the meaning of the ADA; (2) she is qualified and able to perform the essential functions of

1 her job with reasonable accommodation; and (3) she suffered an adverse employment
2 action because of her disability. Allen v. Pacific Bell, 348 F.3d 1113, 1114 (9th Cir.
3 2003) (citing Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1246 (9th Cir. 1999)).
4 SHA contends that Walker has failed to present sufficient evidence to create a genuine
5 issue of material fact on the first element – that she is “disabled” under the ADA – and
6 moves for summary judgment on this issue.
7

8 Under the ADA, a “disabled” person must have an impairment which substantially
9 limits a major life activity. EEOC v. United Parcel Serv., Inc., 306 F.3d 794, 801 (9th
10 Cir. 2002); 42 U.S.C. § 12102(2)(A). As defined in the Code of Federal Regulations,
11 “major life activities” include “functions such as caring for oneself, performing manual
12 tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 29 C.F.R. §
13 1630.2(i). An individual is “substantially limited” in a major life activity when the
14 person is either “unable to perform a major life activity that the average person in the
15 general population can perform,” or is “significantly restricted” in the “condition,
16 manner, or duration under which an individual can perform a particular major life activity
17 as compared . . . to the average person in the general population” 29 C.F.R. §
18 1630.2(j). Determining whether an individual is substantially limited in a major life
19 activity requires courts to consider a variety of factors, including the nature and severity
20 of the impairment, its expected duration, and its expected permanent or long-term impact.
21 Id.
22

23 Here, the parties do not dispute that Walker suffers from osteoporosis, arthritis,
24 carpal tunnel, and glaucoma, or that these impairments limit Walker’s major life activities
25 to some extent. Rather, the parties dispute whether Walker is substantially limited in the
26 major life activities of seeing, walking, performing manual tasks, and working. Based on
27 the record before the court, Walker has failed to present sufficient evidence to
28

1 demonstrate that a genuine issue of material fact exists regarding whether she is
 2 substantially limited in a major life activity.

3 Walker's first claim that her glaucoma substantially limits her vision lacks support
 4 in the record. In the Ninth Circuit, the fact that an individual suffers from "*some* visual
 5 impairment does not necessarily mean that the individual is *substantially* limited in seeing
 6 overall The critical inquiry is whether seeing as a whole is substantially limited for
 7 purposes of daily living." United Parcel Serv., 306 F.3d at 803 (emphasis in original).
 8 Although Walker claims her glaucoma substantially limits her ability to see, her treating
 9 physician states that this impairment only affects her peripheral vision in her left eye
 10 while driving and that she can minimize the problem by simply looking left. Walker
 11 Decl., Exh. A. Walker's treating physician also states that her glaucoma is "well-
 12 controlled using eye drops."⁵ Id. At her deposition, Walker testified that she can see
 13 "very good with those eye drops" and that her glaucoma does not prevent her from
 14 driving.⁶ Means Decl., at 52. Walker has not testified, nor does the record suggest that
 15 her seeing as a whole is substantially limited for the purposes of daily living. Thus,
 16 Walker's glaucoma does not substantially limit her ability to see.
 17

18 Walker's second claim that her disabilities substantially limit her ability to walk
 19 also fail to create a material issue of fact. Her sole evidence for this claim is a disabled
 20

21
 22 ⁵The court must determine whether Walker's glaucoma is disabling under the ADA "with
 23 reference to corrective measures." Sutton v. United Airlines, Inc., 527 U.S. 471, 488 (1999).

24 ⁶The court dismisses Walker's contrary statement in her declaration filed in opposition to
 25 this motion that her glaucoma inhibits her driving ability. Walker Decl., at ¶ 3. Statements in a
 26 declaration that contradict deposition testimony cannot create a genuine issue of fact sufficient to
 27 survive summary judgment without an explanation or attempt to resolve the disparity. Cleveland
v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 806 (1999). Given Walker's failure to resolve the
 28 discrepancy between her deposition testimony and declaration, the court dismisses Walker's
 contrary statement in her declaration.

1 parking permit application on which her treating physician checked a box indicating that
2 she “is severely limited in [her] ability to walk due to arthritic, neurological, or
3 orthopedic condition.” Walker Decl., Exh. F. Walker stated in her deposition, however,
4 that her foot problems and osteoporosis do not prohibit her from “walking and getting
5 around.” Means Decl., at 47-48. Further, the same treating physician (who filled out the
6 application) stated that she could sit, walk, and stand, each for two and a half hours per
7 day. Hayashi Decl., Exh. E. Given Walker’s deposition testimony that her foot
8 impairments do not prohibit her from walking, and her treating physician’s earlier
9 statements about her ability to walk, the court finds that she is not substantially limited in
10 walking.

12 The court also rejects Walker’s third claim that she is substantially limited in her
13 ability to perform manual tasks. “[T]o be substantially limited in performing manual
14 tasks, an individual must have an impairment that prevents or severely restricts the
15 individual from doing activities that are of central importance to most people’s daily
16 lives.” Toyota Motor Manuf., Ky, Inc. v. Williams, 534 U.S. 184, 198 (2002). The only
17 evidence provided by Walker that she is substantially limited in her ability to perform
18 manual tasks is her treating physician’s opinion that she is unable to lift more than 20
19 pounds or perform mechanical maintenance on office machines such as photocopiers,
20 computers, and fax machines. Neither one of these activities qualify as an activity of
21 central importance to most people’s lives. See id. at 197 (“The word ‘substantial’ thus
22 clearly precludes impairments that interfere in only a minor way with the performance of
23 manual tasks from qualifying as disabilities.”). Thus, the court finds that Walker is not
24 substantially limited in her ability to perform manual tasks.

27 Walker’s fourth contention that she is substantially limited in the major life
28 activity of working also fails. To create a genuine issue of material fact on this issue,

1 Walker must demonstrate that she is “significantly restricted in the ability to perform
2 either a class of jobs or a broad range of jobs in various classes as compared to the
3 average person having comparable training, skills and abilities.” 29 C.F.R. §
4 1630.2(j)(3)(i). The regulations suggest courts should consider a variety of factors in
5 determining this issue, including the geographical area to which the individual has access,
6 and the number and types of jobs within that area utilizing similar training, skills or
7 abilities. 29 C.F.R. § 1630.2(j)(3)(ii)(A), (B). Rather than presenting any evidence
8 bearing on these factors, Walker simply argues that she is substantially limited in her
9 ability “to work in the class of work as an administrative assistant or in the broad range of
10 jobs in various classes” when compared to the average person. Pl. Resp., at 7. This type
11 of conclusory statement without sufficient supporting evidence fails to withstand a
12 motion for summary judgment. See Thompson v. Holy Family Hosp., 121 F.3d 537, 540
13 (9th Cir. 1997) (affirming summary judgment for the employer where the plaintiff offered
14 only conclusory allegations that she could not work and failed to offer evidence relevant
15 to the regulations).

18 Finally, Walker’s alternative contention that she qualifies under the ADA as
19 having a disability because SHA “regarded” her as having a disability is without merit.
20 Although the ADA provides that an individual can qualify as having a disability if the
21 individual is “regarded as having” a “physical or mental impairment that substantially
22 limits one or more of the major life activities of such individual,” Walker has failed to
23 bring forth sufficient evidence that SHA regarded her impairments as substantially
24 limiting. 42 U.S.C. § 12102(2)(C). SHA’s efforts to engage in an interactive process
25 with Walker and to accommodate her requests do not mean that SHA regarded her as
26 “disabled” under the ADA. See Thornton v. McClatchy Newspapers, Inc., 261 F.3d 789,
27 798 (9th Cir. 2001) (“[W]hen an employer takes steps to accommodate an employee’s

1 restrictions, it is not thereby conceding that the employee is disabled under the ADA or
 2 that it regards the employee as disabled.”). Even if SHA regarded Walker as “disabled”
 3 under the ADA, Walker still must establish that her impairments substantially limit a
 4 major life activity, which Walker has failed to do, as demonstrated above. Thompson,
 5 121 F.3d at 541 (“As with real impairments, . . . a perceived impairment must be
 6 substantially limiting and significant) (quoting Gordon v. E.L. Hamm & Assocs., Inc.,
 7 100 F.3d 907, 913 (11th Cir. 1996)). Although Walker is limited to some extent by her
 8 physical impairments, they do not substantially limit her major life activities as required
 9 under the ADA.⁷ Thus, the court GRANTS SHA’s motion for summary judgment on
 10 Walker’s failure to accommodate claim.

12 C. Race and Age Discrimination

13 Federal law prohibits employers from terminating an employee based on the
 14 individual’s race or age. 42 U.S.C. § 2000e-2(a)(1) (Title VII prohibiting race
 15 discrimination); 29 U.S.C. § 623(a)(1) (Age Discrimination in Employment Act). To
 16 survive summary judgment, Walker must demonstrate a prima facie case of
 17 discrimination either by proceeding under the evidentiary framework established by
 18 McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), or by producing “direct or
 19 circumstantial evidence that a discriminatory reason more likely than not motivated” her
 20 termination. McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1122 (9th Cir. 2004).⁸

23 ⁷At oral argument, Walker’s counsel conceded that none of Walker’s impairments,
 24 standing alone, are likely sufficient to constitute a “disability” within the meaning of the ADA.
 25 Nonetheless, he argued that her impairments may constitute a “disability” in the “aggregate,”
 26 without providing any supporting authority. Counsel’s argument is unavailing without case or
 statutory authority to support it.

27 ⁸The court assumes the McDonnell Douglas framework governing Title VII discrimination
 28 claims also applies to Walker’s age discrimination claim under the Age Discrimination
 Employment Act (“ADEA”). Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142
 (2000).

1 Walker relies on the McDonnell Douglas framework, alleging that (1) she belongs
 2 to a protected class, (2) she performed according to SHA's legitimate expectations, (3)
 3 she suffered an adverse employment action, and (4) SHA replaced her with an individual
 4 outside the protected class. See Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1220 (9th
 5 Cir. 1998) (citing McDonnell Douglas, 411 U.S. at 802).⁹ The amount of proof required
 6 to establish a prima facie case "is minimal and does not even need to rise to the level of
 7 preponderance of the evidence." Id. (quoting Wallis v. J.R. Simplot Co., 26 F.3d 885,
 8 889 (9th Cir. 1994)). Here, it is undisputed that Walker belongs to a protected class
 9 (African-American, over the age of 40¹⁰), that she suffered an adverse employment action
 10 (termination), and that SHA replaced her with someone outside her protected class
 11 (Caucasian, under the age of 40). Although SHA allegedly terminated Walker for poor
 12 job performance, it does not dispute (and her co-workers confirm), that Walker
 13 previously performed according to SHA's legitimate expectations before being
 14 terminated. See Barraza Decl., at ¶ 3; Jung Decl., at ¶ 17. Thus, the court finds that
 15 Walker has brought forth the "minimal" evidence required to demonstrate that a prima
 16 facie case of discrimination exists. Godwin, 150 F.3d at 1220.
 17

19 Consequently, the burden shifts under the McDonnell Douglas framework to SHA
 20 to produce evidence demonstrating that a legitimate, nondiscriminatory reason exists for
 21 terminating Walker. 411 U.S. at 802. SHA has satisfied this burden by producing
 22 evidence that Walker failed to perform certain job duties consistent with SHA's
 23

24

25 ⁹Although the fourth factor differs slightly from the one employed in McDonnell Douglas,
 26 "it is widely recognized that the test is a flexible one." McGinest v. GTE Serv. Corp., 360 F.3d
 27 1103, 1122-23, n.17 (9th Cir. 2004) (citations omitted).

28 ¹⁰The ADEA protects "individuals who are at least 40 years of age." 29 U.S.C. § 631(a).

1 expectations, including delivering the mail and faxes in a timely manner and maintaining
2 a sufficient number of orientation and “lease-up” packets, among other things. Further,
3 SHA employed a “progressive discipline” approach to Walker’s termination beginning
4 with verbal warnings and written “counseling memorandum,” and escalating to a one-day,
5 and later three-day, suspension over the course of eight months. Neither SHA’s reasons
6 nor its approach appear to be based on age or race and are therefore legitimate, non-
7 discriminatory reasons for Walker’s transfer.¹¹

8 As a result, Walker must provide evidence countering SHA’s showing and
9 suggesting that its reasons for terminating her are mere pretext. McDonnell Douglas, 411
10 U.S. at 804. Walker may prove pretext either by direct evidence “showing that unlawful
11 discrimination more likely motivated the employer,” or by indirect, circumstantial
12 evidence showing that SHA’s reasons are “internally inconsistent or otherwise not
13 believable.” Chuang v. Univ. of Calif. Davis, 225 F.3d 1115, 1127 (9th Cir. 2000).
14 Although a plaintiff may survive summary judgment with a showing of “very little” direct
15 evidence of discrimination, a plaintiff must provide “specific” and “substantial”
16 circumstantial evidence. Godwin, 150 F.3d at 1221-22. Neither approach is exclusive,
17 and Walker may rely on the “cumulative effect” of both types of evidence to avoid
18 summary judgment. Chuang, 225 F.3d at 1127. “If a plaintiff succeeds in raising a
19 genuine factual issue regarding the authenticity of the employer’s stated motive, summary
20 judgment is inappropriate, because it is for the trier of fact to decide which story is to be
21 believed.” Washington v. Garrett, 10 F.3d 1421, 1433 (9th Cir. 1993).

22
23
24
25
26
27 ¹¹The court notes that SHA’s burden to produce a legitimate, non-discriminatory reason
28 “can involve no credibility assessment.” St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 509
(1993).

1 Based on the record before the court and drawing all reasonable inferences in
2 favor of the non-moving party as the court must on summary judgment, the court finds
3 that Walker has brought forth sufficient evidence to demonstrate that a genuine issue of
4 fact exists. Walker offers both direct and circumstantial evidence of pretext. Two of
5 Walker's former co-workers allege that Atkins (her direct supervisor), Roseth
6 (Porchlight's director), and Hayashi (SHA's Director of Human Resources) all made
7 comments that Walker should retire. Barraza Decl., at ¶¶ 7-8; Polwort Decl., at ¶ 4.
8 Roseth's alleged statements that she was "afraid of black women" and that her co-
9 workers should "watch out" for three SHA employees, all African-American women,
10 because they are "out to get us," are of little evidentiary weight, if any, given that they
11 were made two years prior to Walker's termination.¹² Nonetheless, a plaintiff need only
12 show "very little" direct evidence of discrimination to survive summary judgment, and
13 the alleged age-related comments are sufficient to establish that a genuine issue of fact
14 exists regarding whether SHA's proffered reasons for terminating Walker were pretext for
15 age discrimination.

16 Walker's circumstantial evidence surrounding her job duties and performance
17 provide "specific" and "substantial" evidence to create a material issue of fact regarding
18 whether SHA's reasons for terminating her were pretext for race discrimination. It is
19 undisputed that Walker worked for SHA for 15 years almost without incident.¹³ Both
20 Walker's former supervisor and co-worker allege that Walker was qualified and
21

22
23
24
25 ¹²The court will not consider on summary judgment whether these statements are too
26 remote in time and unspecific as to be properly excluded from the fact finder.

27 ¹³The record reveals that Walker received a counseling memorandum on April 26, 2002
28 for improperly opening confidential mail. Hayashi Decl.

1 performed her job well. Barraza Decl., at ¶¶ 3-4; Jung Decl., at ¶17. Yet, between
2 January 2003 and August 2003, Atkins issued Walker nine counseling memoranda and
3 suspended her twice for failing to maintain the appropriate number of packets. Atkins'
4 written warnings cited Walker for everything from failing to deliver the mail at scheduled
5 times and compiling enough packets, to minor abuses such as improperly opening an
6 employee's pay slip and failing to take a 10-minute break on two separate occasions
7 because she was "too busy" and had "tons of mail" to deliver.

8 Further, despite the allegedly tripled number of packets needed by SHA, Atkins
9 did not give Walker additional time to complete them and allegedly assigned her more
10 duties. Jung Decl., at ¶ 12. One of Walker's Caucasian co-workers under the age of 40,
11 who held her same position, alleges that Atkins gave Walker a "heavier" workload than
12 him, with more production-related duties. Jung Decl., at ¶ 7. Two of Walker's former
13 co-workers and a former supervisor allege that Atkins belittled Walker in front of other
14 employees and held her to a "100% compliance standard" unlike other non-African-
15 American and younger employees. Polwort Decl., at ¶ 3; Barraza Decl., at ¶ 5; Jung
16 Decl., at ¶¶ 14-15. Based on this circumstantial evidence and Walker's deposition
17 testimony that Atkins "picked at every job, every single job I did," a reasonable fact
18 finder could find that Atkins' reasons for terminating Walker were pretext for
19 discrimination. Walker Dep. Test., at 130. Thus, the court DENIES SHA's motion for
20 summary judgment on Walker's age and race discrimination claims.
21

22 **D. Retaliation**

23 Title VII prohibits employers from discriminating against employees who have
24 "made a charge, testified, assisted, or participated in any manner in an investigation,
25 proceeding, or hearing." 42 U.S.C. § 2000e-3(a). To establish a prima facie case of
26 retaliation, Walker must demonstrate that (1) she engaged in a protected activity, (2) SHA
27

1 subjected her to an adverse employment action thereafter, and (3) a causal link exists
 2 between the protected activity and the adverse employment action. Porter v. Calif. Dep’t
 3 of Corr., 383 F.3d 1018, 1029 (9th Cir. 2004). If Walker satisfies this burden, then SHA
 4 must “articulate a legitimate, non-retaliatory reason for its actions.” Id. Assuming SHA
 5 provides such evidence, then Walker bears the “ultimate burden” of submitting sufficient
 6 evidence indicating that SHA’s proffered reasons are merely a pretext for a retaliatory
 7 motive. Id.

9 Here, Walker devotes one sentence to her retaliation claim in opposition to
 10 summary judgment. Pl. Resp., at 6. The sentence refers to Walker’s testimony at her
 11 deposition that “[a]ll this stress came after I filed with the EEOC.” Walker Dep. Test., at
 12 130. There is no evidence in the complaint,¹⁴ moving papers, or attached exhibits
 13 establishing when Walker filed her claim with the EEOC. Given the little attention
 14 Walker devotes to her retaliation claim, it is difficult to assess the merits. Nonetheless,
 15 Walker’s EEOC charge clearly qualifies as a protected activity¹⁵ under Title VII, and
 16 being fired constitutes an adverse employment action. 42 U.S.C. § 2000e-3(a); Ray v.
 17 Henderson, 217 F.3d 1234, 1241-43 (9th Cir. 2000).

19 Walker’s retaliation claim fails, however, because she fails to provide sufficient
 20 evidence that a “causal link” exists between filing the EEOC charge and being
 21

22 ¹⁴Walker’s complaint states only, “Plaintiff’s discipline increased after she filed an EEOC
 23 charge and alleged race, age, and disability discrimination, as well as retaliation.” Compl., at ¶ 13.

24 ¹⁵In addition, one of Walker’s former supervisors states in his declaration that Walker’s
 25 “problems are also temporally proximate to certain protected actions she engaged in. For
 26 instance, she testified for me in my administrative action against SHA in 2002. Her problems
 27 began with her April 2002 performance evaluation.” Barraza Decl., at ¶ 9. Walker’s briefing,
 28 however, makes no reference to this *potentially* protected activity as part of her retaliation claim
 and it is unclear from the supervisor’s statement whether the administrative action involved
 unlawful employment practices under Title VII.

1 terminated, beyond her conclusory statement in her deposition. Ray, 217 F.3d at 1244
2 (finding causal link where the alleged adverse employment actions followed “close on the
3 heels” of plaintiff’s complaints); Porter, 383 F.3d at 1030 (finding causal link when
4 circumstantial evidence of a “pattern of antagonism” followed the protected conduct). On
5 summary judgment, the non-moving party “must set forth specific facts showing that
6 there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). Because there is no evidence
7 establishing when Walker filed her EEOC charge and its temporal proximity to her
8 allegedly increased discipline and ultimate termination in August 2003, the court
9 GRANTS SHA’s motion for summary judgment on Walker’s retaliation claim.

10 **E. Hostile Work Environment**

11 Title VII’s prohibition against race discrimination in the workplace “encompasses
12 the creation of a hostile work environment.” McGinest, 360 F.3d at 1112. To survive
13 summary judgment, Walker must show that (1) SHA subjected her to verbal or physical
14 conduct of a racial nature, (2) that was unwelcome, and (3) “sufficiently severe or
15 pervasive to alter the conditions of [her] employment and create an abusive work
16 environment.” Vasquez v. County of Los Angeles, 349 F.3d 634, 642 (9th Cir. 2004).
17 To determine whether conduct was sufficiently severe or pervasive to violate Title VII,
18 the court must consider “all the circumstances, including the frequency of the
19 discriminatory conduct; its severity; whether it is physically threatening or humiliating, or
20 a mere offensive utterance; and whether it unreasonably interferes with an employee’s
21 work performance.” Id. (quoting Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 270-
22 71 (2001)). The conduct at issue must be perceived as abusive, both subjectively from
23 Walker’s perspective and objectively from the perspective of a reasonable African-
24 American. McGinest, 360 F.3d at 1115.
25
26
27

1 Walker perceived her work environment as abusive as evidenced by her deposition
2 testimony and decision to file an EEOC charge. Id., at 1113. Yet, she fails to bring forth
3 sufficient evidence to demonstrate that SHA subjected her to racially-based verbal or
4 physical conduct which a reasonable African-American would find abusive. When asked
5 about the basis of her hostile work environment claim at her deposition, Walker stated
6 that Atkins created a hostile work environment at Porchlight by threatening to terminate
7 her in multiple counseling memoranda if her job performance did not improve, and by
8 allowing her to engage in a “publicly hostile situation” with another African-American
9 co-worker who became frustrated with Walker’s filing. Walker Dep. Test., at 134, 157-
10 60. Walker did not suggest at her deposition that Atkins or anyone else ever made any
11 racially derogatory comments to her, or that she ever witnessed any racially derogatory
12 conduct at Porchlight.¹⁶ The only evidence in the record involving race-based comments
13 or conduct consists of Roseth’s alleged statements two years prior to Walker’s
14 termination that she was “afraid of black women” and that three particular SHA
15 employees, all African-American, were “out to get us.”
16

17 Drawing all reasonable inferences in favor of Walker, this evidence is insufficient
18 to avoid summary judgment on a hostile work environment claim in the Ninth Circuit.
19 Vasquez, 349 F.3d at 643-44 (reviewing case law and finding that alleged harassing
20 conduct, including two racial epithets directed at the plaintiff, was insufficient to create a
21 hostile work environment); see also Nichols v. Azteca Rest. Enter., Inc., 256 F.3d 864,
22 870 (9th Cir. 2001) (hostile work environment existed where male plaintiff subjected to
23

24
25
26 ¹⁶Although Walker’s co-workers allege generally that Atkins belittled Walker in front of
27 other employees and publicly criticized her job performance allegedly unlike other non-African-
28 American, younger employees, they do not allege that Atkins made any specific race-based
comments to Walker.

1 relentless insults, name-calling, and vulgarities, including taunts of “faggot” and “f--king
2 female whore”). The court GRANTS SHA’s motion for summary judgment on Walker’s
3 hostile work environment claim.

4 **IV. CONCLUSION**

5 For the reasons stated above, the court GRANTS SHA’s motion for partial
6 summary judgment on Walker’s failure to accommodate claim (Dkt. # 26), GRANTS in
7 part and DENIES in part SHA’s motion for partial summary judgment on Walker’s race,
8 age, and retaliation claims (Dkt. # 30), and GRANTS SHA’s motion for partial summary
9 judgment on Walker’s hostile work environment claim (Dkt. # 34).

10
11 Dated this 10th day of May, 2005.
12

13
14 
15

16 JAMES L. ROBART
17 United States District Judge
18
19
20
21
22
23
24
25
26
27
28